No. 75-719

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the district court is entitled to appoint counsel to represent fugitive defendants in criminal cases without the defendants' knowledge, consent or participation, and to order discovery against the government in such cases. Petitioners also contend that the court of appeals is without power to issue a writ of mandamus directing the district court to vacate the order allowing discovery.

On November 6, 1974, the United States District Court for the District of Hawaii issued an order appointing three attorneys to represent some fifteen individuals who had been indicted for selective service violations but who had subsequently become fugitives (Pet. App. 5a-6a).

The appointed counsel filed a motion for discovery, seeking to inspect the selective service files of the individuals

in question. The government opposed this motion, arguing that the attorneys had not been retained or authorized by the individuals to represent them. The district court granted the motion on December 18, 1974 (Pet. App. 7a).

The government then sought writs of mandamus and prohibition, requesting the court of appeals to vacate the discovery order and to direct the district court to cease entertaining motions raised by the appointed attorneys. On January 22, 1975, the court of appeals denied the petition (Pet. App. 1a). It vacated the denial on February 13, and on June 25, 1975, it granted the petition for a writ of mandamus and directed the district court to vacate its discovery order (Pet. App. 2a, 3a).

1. Petitioners contest the revocation of the district court's discovery order, but this Court recently has denied certiorari in an identical case. *United States* v. *Weinstein,* 511 F.2d 622 (C.A. 2), certiorari denied *sub nom. Austin* v. *United States,* 422 U.S. 1042, rehearing denied, October 6, 1975. As we pointed out in our brief in that case,[1] the defendants on whose behalf the petition was filed are fugitives, who are not entitled "to call upon the resources of [this] Court for determination of [their] claims." *Molinaro* v. *New Jersey,* 396 U.S. 365, 366. Beyond that, as the court of appeals held in *Weinstein, supra,* 511 F.2d at 628, a district court possesses no legitimate authority in our adversary system to appoint counsel to represent and make motions on behalf of fugitive defendants who have not authorized such representation.[2]

2. Relying on *Will* v. *United States,* 389 U.S. 90, petitioners also contend that mandamus does not lie to correct

[1]A copy of our response in *Austin,* No. 74-1170 is being furnished to counsel for petitioners.

[2]There is a serious question here, as there was in *Weinstein,* whether counsel for the individual fugitives are authorized to file a petition. We pretermit that question here, however, because the district court and Judge King are properly before this Court.

the errors committed by the district court. *Will* was decided at a time when the government's rights of appeal in criminal cases were narrowly circumscribed and was, we submit, very much a product of the Court's concern that mandamus not become a means of subverting the congressional policy against government appeals. That policy has been completely reversed by Congress (see *United States* v. *Wilson,* 420 U.S. 332, 339), and we think the underpinnings of *Will's* restrictive views of the availability of mandamus to the government in criminal cases have thus been largely removed. In any event, *Will* contemplated the use of mandamus in "circumstances amounting to a judicial 'usurpation of power' " (389 U.S. at 95). Mandamus has often been used when interlocutory orders in criminal cases establish such judicial usurpation. As the court held in *Weinstein* in identical circumstances (511 F.2d at 626):

> We believe this to be one of those rare, *sui generis* cases in which unique circumstances require that the writ be granted. For reasons noted below, we are satisfied that the district judge has clearly exceeded his powers. Issuance of the writ will not affect any defendant's constitutional right to a speedy trial, since each is a long-time fugitive who has not sought trial but, on the contrary, by fleeing the jurisdiction, has prevented his case from being brought promptly to trial.[3]

[3]Petitioners attempt to distinguish *Weinstein,* arguing that because the district court in that case had entertained motions by the appointed attorneys to dismiss the indictments, the government's mandamus petition directed to those motions would have been proper. But the motions to dismiss in *Weinstein* were denied by the district judge and were not the subject of the mandamus petition. There, as here, the government asked that the discovery orders be vacated and that the district court be ordered to cease hearing any motions on behalf of defendants who had not authorized the representation.

See also *United States* v. *McMillen*, 489 F.2d 229 (C.A. 7); *United States* v. *DeLeon*, 498 F.2d 1327 (C.A. 7); *United States* v. *Carter*, 493 F.2d 704 (C.A. 2); *United States* v. *Dooling*, 406 F.2d 192 (C.A. 2); *United States Board of Parole* v. *Merhige*, 487 F.2d 25 (C.A. 4), certiorari denied, 417 U.S. 918.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.